EVIDENCE — HEARSAY — Hearsay exceptions where availability of declarant is immaterial: "Excited utterances" — Revised 3/2010

Rule 803, Ariz. R. Evid., gives several categories of statements that are not excluded by the hearsay rule, whether or not the declarant -- the person who made the statement -- is available as a witness. One of these is an "Excited utterance," defined as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2). For a statement to be admissible as an excited utterance, three requirements must be satisfied:

> (1) there must have been a startling event;
> (2) the statement must have been made soon after the event so that the declarant did not have time to fabricate; and
> (3) the statement must relate to the startling event.

State v. Whitney, 159 Ariz. 476, 482, 768 P.2d 638**,** 644 (1989)*; State v. Ritchey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971); *State v. Johnson,* 183 Ariz. 623, 634, 905 P.2d 1002, 1013 (App. 1995). The exception relies on the assumption that "the excitement of certain startling events stills the reflective faculties," making it likely that an excited utterance is a "'natural' response to the actual sensations and perceptions produced by the preceding external shock," which thereby increases the chance that the statement will be truthful and reliable. *State v. Rivera*, 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984).

An excited utterance may be impeached. In *State v. Hernandez,* 191 Ariz. 553, 959 P.2d 810 (App.1998), Hernandez shot and killed the victim. Twenty minutes after the shooting, he called 911 and reported the shooting, saying that the victim had attacked him with broken bottles and that he had had to shoot the victim in self-defense.[(1)] At trial Hernandez moved in limine to admit the 911 tape recording as an

excited utterance. The State noticed its intention to impeach Hernandez's statements on the 911 tape with his prior convictions pursuant to Rule 806, Ariz. R. Evid., regardless of whether he chose to testify at trial. Hernandez did not testify at trial, but he did introduce the 911 tape. The trial court permitted the State to impeach Hernandez with his prior convictions, and he was convicted of second-degree murder. On appeal, Hernandez argued that Rule 806 only applied to hearsay statements, not non-hearsay excited utterances. However, the Court ruled that excited utterances may be impeached under Rule 806, Ariz. R. Evid., with any prior felony conviction, even though excited utterances are not hearsay. "Although excited utterances are admissible because they are inherently trustworthy, that badge of trustworthiness does not render them unimpeachable." *Id*. at 557, ¶ 11, 959 P.2d at 814. Ultimately, it is the jury which decides the truthfulness of all testimonial statements, including excited utterances. *Id.* The Court of Appeals noted:

> Arizona law does not require that, as a condition to admissibility, the court find that the declarant's statement was actually produced without reason or reflection to be a condition of admissibility. The statement may be admitted if, under all the circumstances of the declaration, the speaker may be considered as speaking under the stress of nervous excitement. *Keefe v. State*, 50 Ariz. 293, 298-299, 72 P.2d 425, 427 (1937). A jury may still find that the declarant of an excited utterance admitted under Rule 803(2) was not so influenced by the stress of excitement as to be incapable of fabricating the facts or acting in his or her own self interests. For this reason, Rule 806 permits the admission of a felony conviction to test the credibility of the declarant of an excited utterance.

Id. at 558, ¶ 15, 959 P.2d at 815.

There is no particular time limit for an excited utterance following a startling event. Rather, the issue is whether the declarant is still suffering from the shock of the event. In *State v. Anaya,* 165 Ariz. 535, 799 P.2d 876 (App. 1990), Anaya got drunk and

abusive, brandished a rifle at his wife and children, fired three shots, threatened his wife, and struck her with a rifle butt. His wife managed to escape from the home at about midnight, leaving their two children, aged eight and ten, in the house, and called the police. The police surrounded the home while she told them what Anaya had done and expressed fear for the safety of her husband and children. During a nightlong standoff, Anaya remained in the home, threatening the police. He released the ten-year-old but kept the eight-year-old with him. At about 4:30 a.m. an officer interviewed the wife, who told them what had precipitated her midnight call to police. Eventually, Anaya surrendered. He was charged with aggravated assault and endangerment. At trial, the wife denied any recall of the events and attempts to refresh her memory from police reports were unsuccessful. Over defense objections, the State moved to admit the police report of the interviews with police into evidence as an excited utterance under Rule 803(2), Ariz. R. Evid.

Anaya was convicted of aggravated assault and endangerment. On appeal, he argued that the statement should not have been admitted. The Court of Appeals found no error, stating, "The spontaneity of a statement is determined from the totality of the circumstances." *Id*. at 539, 799 P.2d at 880. The Court noted that the Arizona Supreme Court has repeatedly held that the physical and emotional condition of the declarant at the time of the statement affects spontaneity more than the mere lapse of time between the event and statement. *Id*. When the wife made her original statement to police, she was crying and hysterical. Her second statement, some four hours later, was made while Anaya was still holding their eight-year-old child. The officer who interviewed her said she was distraught and expressed "absolute sick worry" about the child's welfare

during the interview. The Court of Appeals reasoned that since she was still under the stress of nervous excitement from the startling event, a statement after the event can be spontaneous "where there is no break or letdown in the continuity of the transaction."

> Testimony that a declarant still appeared nervous or distraught and that there was a reasonable basis for continuing emotional upset can be sufficient proof of spontaneity even where the interval between the startling event and the statement is long enough to permit reflective thought.

Anaya, 165 Ariz. at 540, 799 P.2d at 881.

Similarly, a statement made some nine hours after a sexual assault was held to be an excited utterance in *State v. Starcevich,* 139 Ariz. 378, 678 P.2d 959 (1983). In that case, the defendant held the victim against her will in the desert for approximately 24 hours and sexually assaulted her repeatedly before he dropped her off along the interstate highway north of Tucson. The victim walked to a telephone, called the rape crisis center, and waited in a cafe for help to arrive. The waitress testified that the victim told her she had been raped. The waitress said that the victim seemed "completely broken" and that tears were running down her face, and noted, "Her mouth was so swollen and scratched she couldn't even eat her soup." *Id*. at 388, 678 P.2d at 969. Starcevich was convicted of kidnapping and sexual assault. On appeal, he contended that the amount of time between the rape and the victim's statement gave the victim time to fabricate her story. The Court disagreed, citing *State v. Barnes,* 124 Ariz. 586, 589-590, 606 P.2d 802 (1980). The Court quoted *Barnes, supra*:

> Lapse of time is only one factor to be considered. If the totality of the circumstances indicate that the statement was made in a state of shock or his demeanor and actions had been altered, it is admissible even though not made immediately after the event.

State v. Starcevich, 139 Ariz. 378 at 387-388, 678 P.2d at 968-969. The Court of Appeals noted that the waitress's testimony was sufficient evidence from which "the trial court could properly conclude [the victim] was in such a state of shock that her statement was admissible."

An excited utterance may be made in response to police questioning. In *State v. Whitney,* 159 Ariz. 476, 768 P.2d 638 (1989), Whitney picked up two teenage girl hitchhikers in his truck. When they asked to get out, he pulled over, but then chased them in his truck, trying to run over them. He got out of the truck, caught one of the girls, and tried to pull her into the truck; when she resisted, he tried to choke her. The other girl attracted the attention of three men in another car; that car stopped and Whitney then jumped in his truck and escaped. The men pursued Whitney in their car. The three men then saw an officer on the street and ran up to him, shouting about the attack. Due to the fact that they were so excited and talking at once, the police officer had to separate them and ask specific questions. *Id*. at 483, 768 P.2d 638 at 645. By the time of trial, the three men could not be found and it appeared that they had given the police false addresses and possibly false names. Over the defense's objections, the State presented the three men's statements to police as excited utterances.

Whitney was convicted of kidnapping and aggravated assault. On appeal, he argued that the statements were not admissible as excited utterances because they were made in response to police questions. However, the Court of Appeals ruled that a statement made in response to a police officer's questions is not necessarily inadmissible. *Id*. at 483, 768 P.2d at 645. In this case, the court noted, it was the witnesses who initiated the conversation with the police officer, and the officer testified

that the witnesses were so excited at the time that they were all talking at once. "These statements still qualify as excited utterances even though some were in part responses to the officer's questions." *Id*.

Whitney also argued that the witnesses' statements should have been excluded because the fact that they gave false addresses showed that they were unreliable. *Id*. at 483, 768 P.2d at 645. The Court noted, "We have not confined the application of the excited utterance exception solely to indisputably reliable witnesses," citing *State v. Jeffers,* 135 Ariz. 404, 419-20, 661 P.2d 1105, 1120-21. "Admission as a hearsay exception is not foreclosed by the fact that a witness's reliability has been impugned;" attacks on the witnesses' reliability go to the weight of the statements, not their admissibility. *Id*. In addition, the Court stated that there are other facts indicating that the statements were reliable. The witnesses were neutral; they did not know any of the parties involved; each of the witnesses relayed the same story to the police while they were still excited; and their statements corroborated the victims' statements. 159 Ariz. at 484, 768 P.2d at 846. Therefore, the trial court did not abuse its discretion in allowing their excited utterances to be admitted into evidence.

Another case involving excited utterances is *State v. Carr*, 154 Ariz. 468, 743 P.2d 1386 (1987). In that case, Carr loudly yelled at and argued with the victim as the victim sat outside. The victim challenged Carr to come outside and repeat his accusations. Just before Carr went outside, he told T.M. "That's it," and said, "I'm going to kill that s.o.b." Carr went outside, stabbed the victim repeatedly, and fled. T.M. and G.S., among others, ran to help the victim and unsuccessfully tried to stop the flow of blood from his wounds. As they tried to save the victim's life, G.S. heard T.M. repeat the

fact that Carr had just threatened the victim. At trial, T.M. testified that he did not remember making that statement to G.S., but did not deny doing so. G.S. testified that T.M. made this statement and the trial court admitted that statement as an excited utterance by T.M. Carr was convicted of first-degree murder and on appeal, he claimed that the trial court erred by allowing G.S. to testify about T.M.'s statement. The Arizona Supreme Court held that the statement was properly admitted as an excited utterance, noting that the startling event was still in progress when T.M. made the statement to G.S., "who was desperately trying to staunch the massive flow of blood from the dying victim. The statement has all the indicia of reliability which has led to acceptance of the excited utterance rule." *Id*. at 470, 743 P.2d at 1388. Also in *Carr*, the defendant unsuccessfully attempted to introduce as an excited utterance a statement he made to the police shortly after his arrest. However, the Arizona Supreme Court held that the trial court properly excluded the defendant's statement to the arresting officers because the statements were made after the defendant had time, opportunity, and motivation to fabricate. *Id*. at 472, 743 P.2d at 1390.

An excited utterance may consist of gestures as well as words, because Rule 801(a), Ariz. R. Evid., provides that a "statement" may be oral, written, or conduct intended to convey a meaning, that is, "assertive conduct" such as nodding one's head for yes. In *State v. Bauer*, 146 Ariz. 134, 704 P.2d 264 (1985), Bauer volunteered to babysit for a two-year-old girl at his trailer. When the girl returned home, the mother noticed the girl was upset; the girl then went to the bathroom and took off her pants. When her mother asked her why she was taking off her pants, the girl, who was just learning to talk, kept saying "guy." The mother questioned the child as to whether "guy"

took off her pants and the girl said "yes." The mother then asked the girl, "What did the guy do?" The girl started to rub her vagina and repeated "guy, guy." The mother asked where "guy" was and the girl pointed to Bauer's trailer. *Id*. at 136, 704 P.2d at 266. Bauer was convicted of child molestation. Defendant argued that it was error to admit the victim's statement as an excited utterance because, due to her age, the victim was not available to testify. The court stated that Rule 803(2) is entitled "Hearsay Exceptions; Availability of Declarant Immaterial" and disagreed with Bauer's contention. *Id*. at 137, 704 P.2d at 267. Citing *State v. Boodry,* 96 Ariz. 259, 394 P.2d 196 (1964), and *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908), the Court noted that in Arizona, excited utterances of children who are incompetent to testify due to their age are admissible. *Id*. at 137, 704 P.2d at 267. In addition, Bauer claimed that the victim did not make any "statement," since she only used the word "guy." However, the Court stated that the child's stating "guy" along with her assertive conduct -- showing her mother what "guy" did to her -- was "functionally equivalent to a statement that guy was rubbing my vagina.'" *Id*. at 137, 704 P.2d at 267.

1. There is a significant argument that the statement should never have been admitted as an excited utterance, since the twenty minutes between the shooting and the telephone call gave the defendant an opportunity to reflect and fabricate an exculpatory statement. The dissenting judge in *Hernandez* attributed the result of the case to the majority's "unstated dissatisfaction with the trial court's ruling that defendant's 911 call qualified as an excited utterance," and stated that he also disagreed with the trial court on that point. *Hernandez*, dissenting op., *Id*. at 564, ¶ 56, 959 P.2d at 821.